F. M. S. REPORTS.

[APPELLATE CIVIL JURISDICTION]

HORNE, J.

March 4, 1940.

MERCANTILE BANK OF INDIA

v.

T. F. EGAN AND MARION BRADDON.

The Land Code (Cap. 138) Section 149—The Civil Procedure Code (Cap. 7) Section 5—Chargee's order for sale—Whether decree—Power of Registrar to give further directions as to time and place of sale.

On the 18th June, 1928, the Judge made an order for sale of the charged property. On the 18th June, 1935, the Assistant Registrar fixed the date and place of sale and his order was approved and confirmed by the Judge. On the 24th June, 1935, the Assistant Registrar, by consent, postponed the sale **sine die** "with liberty to the chargees to apply for further directions". Upon the chargees applying for further directions as to the date and place of sale, the Assistant Registrar refused to give such directions on the ground that the order for sale dated 18th June, 1928, was a decree and the summons for directions was an application for execution made more than one year after the decree without compliance with section 264 of the Civil Procedure Code.

Held, (1) that chargees' proceedings are not a suit. (**Chettiappa Chetty v. Raja Abdul Rashid**[1] and **Murugappa Chettiar v. Letchumanan Chettiar**[2] followed).

(2) that an order for sale is not a decree.

(3) that when, after the usual chargee's order for sale, the date and place of sale has been fixed by the Registrar and approved and confirmed by the Judge, the Registrar has no power, even by consent, to make an order postponing the sale **sine die** with liberty to the chargees to apply for further directions. Parties cannot by consent give one another a liberty to apply otherwise than in accordance with the law.

(4) that by section 149 of the Land Code the chargor is to have an opportunity to show cause against the sale before the order fixing the time and place of sale is made by the Court. The Assistant Registrar was therefore right in refusing to give further directions as to the time and place of sale. The chargees' proper course was to apply under section 149 of the Land Code calling upon the chargors to show cause.

Cases referred to:—

(1) *Chettiappah Chetty v. Raja Abdul Rashid,* (1931-1932) F.M.S.L.R. 345.

(2) *Murugappa Chettiar v. Letchumanan Chettiar,* (1939) 8 M.L.J. 296; (1938) F.M.S. L.R. 116.

APPEAL FROM ASSISTANT REGISTRAR.

C. Mills for chargees.

The order for sale is not a decree (*Chettiappa Chetty v. Raja Abdul Rashid*[1]) and the order is not made in a suit (*Murugappa Chettiar v. Letchumanan Chettiar*[2]). Section 264 of the Civil Procedure Code does not apply.

The chargors had an opportunity to shew cause at the original hearing in 1928. They failed to do so. The Registrar should have given the necessary directions pursuant to the consent order giving liberty to apply for such directions.

R. H. V. Rintoul for chargors.

Although an originating summons is not a "suit" within section 5 of the Civil Procedure Code, the word "suit" in relation to "decree" as defined by section 2 must be given its widest meaning. A decree can be made on an originating summons (cf. section 467 (c) coupled with section 230 of the Civil Procedure Code). The Code envisages decrees made on originating summons and not only in suits within sections 5 and 41 of the Code.

Horne, J.—I apprehend that the real question I have to decide here is what is the proper procedure for the chargees to adopt in this particular case.

They made their application under section 149 in May, 1928. They obtained an order on 18th June, 1928, which did not fix the time, but ordered the land to "be sold by public auction under the direction of the Court". No sale took place. No further step was taken until 13th April, 1935, when the chargees took out a Summons in Chambers applying that the chargors show cause why execution should not issue on the order for sale of 18th June, 1928, and failing cause that a date be fixed and further directions be given for a sale of the charged property. All that can be said of this application is that it gave the chargors an opportunity to show cause why the land should not be sold. The result of this summons was an order of reference to the Registrar, and an order by the Registrar approved and confirmed as to date and place of sale by the Judge dated 18th June, 1935.

For the first time, seven years after the first order, there was an order for sale which was operative. Having obtained this the chargees applied on the 24th June, 1935, by a Summons in Chambers before the Registrar "to postpone the sale *sine die* with liberty to the chargees to apply for further directions". The Registrar by consent made the order applied for. I do not think he had any authority to make such an order.

The position now is that the chargees wish to sell. The effective order for sale of June, 1935, has not

been acted upon. To say that they can now sell under that order or the order of 1928 by applying to the Registrar would override one of the principal provisions of section 149, namely, that the chargor is to have an opportunity to show cause against the sale before the order fixing the time and place of sale is made by the Court. Parties cannot by consent give one another a liberty to apply otherwise than in accordance with the law.

What the chargees in this case seem to me to desire is to proceed as if they were executing a decree, and yet refuse to give the chargors the opportunity to show cause against sale which they would have if the order were a decree, or which they have if the application is made under section 149.

There has been much argument before the Registrar and before me as to whether the order of 1928 is a decree. Mr. Rintoul, for the chargors, submits that the order made on the first application in 1928 is a decree and that section 264 of the Civil Procedure Code applies. His argument is founded upon the fact that these applications are made at present on an originating summons, and that as accounts are usually taken, the proceeding is a suit and the order is a decree. Mr. Mills submitted that the order made in 1928 is not a decree, that the sale had been postponed by order of the Court with liberty to the chargees to apply and therefore he was right in applying by Summons in Chambers before the Assistant Registrar to give directions for the sale: a sale previously ordered by the Court upon a default in 1928.

The order is not a decree. The proceeding is not a suit. No decisions have to be taken as to whether the applicant has a charge or whether he has a power of sale, so there is no adjudication upon any substantive issue and therefore no judgment and no decree. I would describe the proceeding under section 149 as an application for the execution of a power of sale.

I have dealt with the matter so far as one of first impression. There are, however, two cases—*Chettiappah Chetty v. Raja Abdul Rashid*[1] and *Murugappa Chettiar v. Letchumanan Chettiar*[2] which both decide that a proceeding under section 149 is not a suit.

For these reasons I think the Assistant Registrar was right in refusing to give directions.

The appeal is dismissed with costs. The chargees should, in my opinion, proceed by applying by an originating summons calling upon the chargors to show cause.

Appeal dismissed with costs.

[APPELLATE CIVIL JURISDICTION]

POYSER, C.J.

April 8, 1940.

S. SEETHAINAYAGEE AMMAL v. M.R.M. RAMASAMY CHETTIAR.

The Land Code (Cap. 138)—Chargee's application for sale—Part heard before one Collector—Hearing continued before another—Legality.

On a chargee's application for sale, the chargee gave evidence and was cross-examined for two days before one Collector of Land Revenue. The hearing was continued before another Collector, who made an order for sale. The evidence of the chargee, upon which the case depended, was challenged.

Held, that in the absence of any statutory provision, it is at least irregular, if not unlawful, for a Judge to continue the hearing of a case which has been part-heard by another Judge; and particularly so where there is a conflict of evidence.

Cases referred to:—

(1) *British Reinforced Concrete Engineering Co. Ltd., In re application of,* 45 T.L.R. 186.

(2) *Coleshill v. Manchester Corporation,* (1928) 1 K.B. 776.

APPEAL FROM COLLECTOR OF LAND REVENUE.

W. G. W. Hastings for appellant.

J. T. Tosswill for respondent.

Poyser, C.J.—This is an appeal against a decision of the Collector of Land Revenue, Kuala Lumpur, ordering that certain lands, registered in the appellant's name and charged to the respondent, be sold. At the conclusion of the arguments, I allowed the appeal, but stated that I would give my reasons for so doing in a written judgment.

The first ground of appeal was as follows:—

> "That the Collector who gave judgment in the case had no power to give a decision, as part of the evidence had been heard by another Collector and the evidence given before the first Collector was not heard by the Collector who gave the decision".

The application for the order for sale first came before Raja Uda bin Raja Muhammad, the then Collector of Land Revenue, on the 21st of October, 1938, the chargee then gave evidence and was cross-examined. The hearing was continued on the 28th of October, and the cross-examination was then concluded. The next hearing took place on the 5th of October, 1939,